(3)

No. 03-1247

In the Supreme Court of the United States

ELLEN L. BATZEL, a citizen of the State of California,

Petitioner,

v.

ROBERT SMITH, a citizen of the State of North Carolina; TON CREMERS, a citizen or subject of the Netherlands; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

HOWARD S FREDMAN
Counsel of Record
FREDMAN | LIEBERMAN LLP
ATTORNEYS AT LAW
1875 CENTURY PARK EAST
SUITE 2200
LOS ANGELES, CA 90067-2523
(310) 226-6796

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

THIS PETITION PRESENTS A NOVEL AND PROFOUNDLY IMPORTANT ISSUE OF FIRST IMPRESSION REGARDING THE SCOPE OF IMMUNITY UNDER 47 U.S.C. § 230(c). 1

INTERLOCUTORY REVIEW OF THE DENIAL OF AN ANTI-SLAPP MOTION IMPROPERLY EXPANDS THE "COLLATERAL ORDER" DOCTRINE 4

CONCLUSION 6

APPENDIX

Appendix G
Copy of Batzel's "Citatiion of Supplemental Authority" Pursuant to Fed. R. App. P. 28(j), Dated October 29, 2003 . . . . . 1a

TABLE OF AUTHORITIES

Cases

Barrett v. Rosenthal, 114 Cal. App. 4th 1379 (2004), *review granted*, 87 P.3d 797 (Cal., Apr. 14, 2004) 1

Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 52 P.3d 685, 124 Cal. Rptr. 2d 507 (2002) 5

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 5

Metabolife Intern., Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001) 5

Midland Asphalt Corp. v. United States, 489 U.S. 794, 109 S. Ct. 1494 (1989) 4, 5

Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, (1966) 4

Statutes

28 U.S.C. § 1291 5

47 U.S.C. § 230 . . . . . 1, 4

47 U.S.C. § 230(c) 1

Rules

Sup. Ct. R. 10(c)(2003) 1

Fed. R. App. P. 28(j) 1

Fed. R. Civ. P. 56 5

Cal. Code Civ. Pro. § 425.16 4

Cal. Code Civ. Pro. § 425.16(f) 5

Cal. Code Civ. Pro. § 425.16(g) 5

Cal. Code Civ. Pro. § 425.16(j) 5

Cal. Civ. Code § 48a 4

Other

5 B.E. Witkin, *Summary of California Law*, Torts, § 557 (9th ed. 1988) 4

Petitioner Ellen L. Batzel ("Petitioner" or "Batzel") submits this reply to the Brief in Opposition of Respondent Ton Cremers ("Respondent" or "Cremers") dated May 5, 2004 ("Opposition"), as follows:

THIS PETITION PRESENTS A NOVEL AND PROFOUNDLY IMPORTANT ISSUE OF FIRST IMPRESSION REGARDING THE SCOPE OF IMMUNITY UNDER 47 U.S.C. § 230(c).

In his Opposition, Respondent points out that on April 14, 2004, while this Petition was pending, the California Supreme Court granted review of the California Court of Appeal's decision in *Barrett v. Rosenthal*, 114 Cal. App.4th 1379 (2004), *review granted,* 87 P.3d 797 (Cal., Apr. 14, 2004), and that this Petition no longer addresses a conflict between a U.S. Court of Appeals decision and the decision of the highest State Court.[1] That said, this Petition does present a profoundly important question of federal law decided by a U.S. Court of Appeals that has not been, but should be, settled by the Court – the scope of immunity from state defamation law afforded to Internet service providers and users under 47 U.S.C. § 230 and the definition of its terms. Sup. Ct. R. 10(c) (2003).

---

[1] Contrary to Respondent's assertion (Opposition, at 17), Petitioner **did** raise the "distributor immunity" issue shortly after the California Court of Appeal first decided Barrett on October 15, 2003. Attached as Appendix G is a true copy of Batzel's "citation of supplemental authority" pursuant to Fed.R.App.P. 28(j), in the form of a letter dated October 29, 2003 to the Clerk of the U.S. Court of Appeals for the Ninth Circuit, requesting that the case be considered in connection with her Petition for Rehearing/Rehearing En Banc.

As Circuit Judge Gould said in his dissent to the denial of Batzel's petition for rehearing and rehearing en banc in the Ninth Circuit, "Make no mistake: the panel majority coldly goes where no circuit court has gone before, reaching further and providing broader automatic immunity of the most callous and damaging defamation[2] that anyone might maliciously post on the Internet." App. 8a.[3] Cutting through the thicket of verbiage, what the Ninth Circuit has held is that whenever anyone e-mails any obviously defamatory statement or disclosure of another's personal information to a web site operator – even anonymously – and the sender makes it clear that the e-mail is intended for publication, the web site

---

[2] In stating that "Petitioner claims that certain details in the e-mail are false" (Opposition, at 4), Cremers willfully distorts the record below. As the District Court noted, Batzel "has submitted her own declaration under penalty of perjury that she has not bragged about being descendent from Nazi officials and has not inherited any art." App. 67a, Rec. 737-56, 1045-49. Batzel demonstrated that her father served in the U.S. Navy in World War II, that she inherited no art whatsoever, and that she purchased the art she possessed from a Los Angeles art dealer, who submitted his own supporting declaration. Rec. 1345-49, 1476, 1478. The claim that Batzel supposedly told Smith that she had a "history of manic depression" (Opposition, at 2), is a cruel lie, without any foundation whatsoever, first invented by Smith's girl friend, Barbro Bengtson, Rec. 1020, that Cremers and his counsel have chosen to republish repeatedly under the protection of the litigation privilege.

[3] The Court is respectfully referred to Circuit Judge Gould's showing that prior and subsequent U.S. Circuit Court decisions do not "address the question of whether the pre-publication selecting and editing of another entity's information is a 'development' of information, which would place the selector or editor outside the statutory immunity declared by Congress." App. 8a - 10a, nn. 7 & 8.

operator is absolved of all responsibility for the repercussions of disseminating that libel or personal information. That is the case even when the web site operator makes an affirmative choice to select a harshly defamatory e-mail before publication and edits it, and the decision to disseminate the information is not an automatic function of the Internet service. That is so even when the web site operator knows or suspects the information is untrue and that dissemination of a harsh falsehood to 1,000 prominent persons on the Internet would be profoundly harmful to the subject of the disclosure. This is so even when the web site operator has refused to retract the defamatory publication.

The implication of immunity is freedom from responsibility and accountability.[4] With immunity, there is no incentive to print a retraction or correct a mistake,[5] even when

---

[4] One who disseminates a falsehood will not retract or correct it if he or she has no obligation to do so. In this case, Petitioner's requests to Respondent to print a retraction have fallen on deaf ears, and Cremers has magnified the nature, quantity and perniciousness of his attack. Under the immunity afforded by the litigation privilege, and with the demand that Petitioner not pursue redress for her damages, Respondent has published falsehoods repeatedly to the court and/or third parties, as documented by the Record, that Petitioner is supposedly mentally ill, suffers from manic depression, is delusional, is an income tax evader, is a Nazi, etc. This is not honorable, of course, but it is a predictable outcome of a grant of "immunity."

[5] Petitioner submits that, as a matter of decency and common sense, one who selects for publication, and broadly disseminates, obviously defamatory material should be subject, at least, to an implied duty to promptly and adequately retract and correct the falsehood, and to notify the defamed party, as a condition of extending CDA immunity from liability for defamation. Under the

the web site operator has learned the truth and appreciates the harm he has caused. The implication of immunity is to ignore those policies expressed so profoundly by Mr. Justice Stewart, concurring in *Rosenblatt v. Baer*, 383 U.S. 75, at 92, 86 S.Ct. 669, at 679 (1966): "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty." Petitioner submits that the scope of immunity afforded by Section 230 of the Communications Decency Act ("CDA") is profoundly deserving of the Court's attention.

INTERLOCUTORY REVIEW OF THE DENIAL OF AN ANTI-SLAPP MOTION IMPROPERLY EXPANDS THE "COLLATERAL ORDER" DOCTRINE

Respondent argues that denial of an anti-SLAPP motion under Cal. Code Civ. Proc. § 425.16 requires immediate interlocutory review because the purpose of the statute "is to provide substantive immunity from the burdens of a lawsuit." Opposition, at 20. This, according to Respondent, is the equivalent of "an explicit statutory or constitutional guarantee that trial will not occur." Opposition at 22, citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801, 109 S.Ct. 1494 (1989). However, the Court in *Midland Asphalt*

---

state law of many jurisdictions, a subsequent retraction or correction of a mistaken publication is not a defense, although proof of it is admissible in mitigation of damages. 5 B.E. Witkin, *Summary of California Law*, Torts, § 557, at 654 (9th ed 1988). In California, timely publication of an adequate retraction restricts the plaintiff to recovery of special damages, and precludes recovery of general or exemplary damages. Cal. Civ. Code § 48a.

cautioned that, "One must be careful . . . not to play word games with the concept of a 'right not to be tried.' In one sense, any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss the indictment or terminate the trial." *Id.* In fact, California's Supreme Court has recently described the Anti-SLAPP statute as nothing more than "an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims." *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63, 52 P.3d 685, 124 Cal.Rptr.2d 507 (2002). In other words, the statute is a procedural device to discourage obviously meritless claims which implicate free speech and petition, and is infinitely less than the type of statutory or constitutional guaranty referenced in *Midland Asphalt Corp.*, 489 U.S. at 801 – i.e., the Double Jeopardy and Speech or Debate Clauses of the U.S. Constitution. The U.S. Court of Appeals for the Ninth Circuit has already recognized that portions of California's anti-SLAPP statute (i.e., Cal. Code Civ. Pro. §§ 425.16(f) & (g)) directly collide with the discovery-allowing aspects of Rule 56 Fed. R. Civ. P and cannot apply in federal court. *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 845-47 (9th Cir. 2001). (In fact, Petitioner submits that utilization of California's anti-SLAPP procedural law in federal court is not required by *Erie R.R. Co. v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and is improper.) Similarly, California's statutory right under Cal. Code. Civ. Pro. § 425.16(j) to appeal immediately from an order denying a anti-SLAPP motion directly collides with the final decision provisions of 28 U.S.C. § 1291.

CONCLUSION

For the reasons stated above, as well as those set forth in the Petition, Petitioner prays that a writ of certiorari issue.

Respectfully Submitted,

Howard S Fredman
Counsel of Record
FREDMAN | LIEBERMAN LLP
Attorneys At Law
1875 Century Park East
Suite 2200
Los Angeles, CA 90067-2523
(310) 226-6796

APPENDIX G

October 29, 2003

Clerk of the Court
U.S. COURT OF APPEALS, NINTH CIRCUIT
U.S. Court of Appeals Building
95 Seventh Street
San Francisco, CA 94103-1526

ATTN: Cathy Catterson (or her deputy)

Re ELLEN L. BATZEL v. ROBERT SMITH and TON CREMERS, U.S. Court of Appeals, Ninth Circuit,

Case No. 01-56380

Dear Ms. Catterson:

Pursuant to Fed.R.App.P. 28(j), Appellee Batzel cites Barrett v. Rosenthal, - Cal.Rptr.3d -, 2003 Daily Journal D.A.R. 11,437, 2003 WL 22346578 (Cal.App. 1 Dist. Oct. 15, 2003)(No. A096451) for consideration in connection with her Petition for Rehearing/Rehearing En Banc.

Barrett holds that section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. §230, does not immunize persons who are liable for defamation under the common law principle of "distributor or knowledge-based liability" – persons (such as Appellant Cremers) who "know or have reason to know of the defamatory nature of matter they

disseminate." (2003 WL 22346578 at 7, 15-16.) Barrett relates directly to the correct standard of law governing immunity under section 230 of the CDA. (Petition, pp. 2-6.)

This Court may affirm the District Court decision on any ground supported by the record, even on grounds never asserted by the appellee. Angle v. United States, 709 F.2d 570, 573 (9th Cir. 1983).

Barrett critiques Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998), and its progeny, upon which the Panel relied, finding Zeran's analysis of section 230 "flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes." (2003 WL 22346578 at 9.) Reasoning that Congress did not intend "to promote unfettered speech on the Internet" (Id. at 11-13), Barrett concludes that section 230 has not abrogated the common law principle of knowledge-based liability (Id. at 16).

According to Barrett, "Legislative use of the legally uncertain word 'publisher' is simply too flimsy a basis upon which to grant providers and users of interactive computer services what amounts to an 'absolute protection' requiring the 'total sacrifice of the competing value served by the law of defamation' and the subordination of 'a concept at the root of any decent system of ordered liberty.'" (Id. at 10.) Here Batzel established, prima facie, that Cremers was liable for defamation as a "distributor" on the Internet of the Smith e-mail with full knowledge of the defamatory nature of what he was distributing.

Yours truly,

FREDMAN|LIEBERMAN, LLP

By: HOWARD S FREDMAN